Supreme Court of the United States

OCTOBER TERM, 1945

No. 429

MOSES B. SHERR,

Petitioner,

against

ANACONDA WIRE AND CABLE COMPANY and
UNITED STATES OF AMERICA,

Respondents.

REPLY BRIEF FOR PETITIONER

MOSES B. SHERR,
Petitioner *pro se.*

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POINT I

Grounds for granting the writ of certiorari.

1. The decision below rests solely on the Circuit Court's holding that the taking of petitioner's right was proper because he can sue for compensation in the Court of Claims (R. 62). Although we have shown (main br. 27-31) that this ruling conflicts with numerous decisions of this Court, Anaconda finds not a word to defend it; and the Government, apart from a short reference to the Circuit Court's ruling (Gov't br. 13), makes no attempt to reconcile it with our authorities. Thus the decision below, undefended and, presumably, indefensible, stands on the books as a precedent to cast confusion into the Tucker Act and the Court of Claims Act unless this Court, on certiorari, shall correct it.

2. The Government says (br. 14) that at the time the False Claims Statute was amended only 51 *qui tam* actions were pending. The Government must be mistaken; for immediately before the amendment the Attorney General had advised Representative Hancock that "this bill, if passed, will kill about two hundred cases pending under the informer statute" (*Cong. Rec.*, 78th Cong., 1st Sess., p. 10,847, col. 1).

The Government also errs in saying (br. 14) that "the issue here involved has been raised in only two pending suits". Petitioner, with his very limited information, happens to know of four such suits;* it stands to reason that there are more; and even those dismissed might be reopened if this Court grants certiorari herein and reverses the Circuit Court.

3. The decision below would operate as a grave deterrent to all future *qui tam* actions, whether brought pursuant to the amended False Claims Statute or any other law (see Pet. 10-11). For under that decision every *qui tam* plaintiff will, until judgment, be subject to be ousted by the Government;** and "no one would be foolish enough to incur the trouble and expense, or even the ill will, incident to the prosecution of an action for any such forfeiture and damages, subject to the right of the treasury, on *ex parte* statements and personal solicitation, to remit the same", *U. S.* v. *Griswold*, 24 Fed. 361, at 366 (D. C. Ore., 1885). Since Congress manifestly intended to preserve *qui tam* suits, this Court should review the decision below which would remove their economic foundation.

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* They are: (1) the present case; (2) *U. S.* v. *Rockbestos Products Co. et al.*, Civ. No. 19-142 (D. C., S. D. N. Y.), now on appeal; (3) *U. S. ex rel. Nitkey* v. *Dawes*, No. 8757 (C. C. A. 7); (4) *U. S. ex rel. Rodriguez* v. *Weekly Publications, Inc.*, Civ. No. 23-282 (D. C., S. D. N. Y.).

** According to the Court below the Government could certainly oust the *qui tam* plaintiff by legislative action; and, according to Judge Clark (R. 62), the executive could do the same by "assuming enforcement itself", i.e., by bringing an independent suit.

4. Respondents suggest that petitioner brought this action with undue haste. But under a rule which tests a relator's rights by the priority of his suit (our main br. 17), speed of action should be no reproach; and respondents themselves invoked the priority of this action to defeat a later competing suit, *U. S.* v. *Anaconda W. & C. Co.*, 52 F. Supp. 824 (D. C., E. D. Pa., 1943).

Nor can the Government complain that petitioner outsped it in a "race to the courthouse". The Government's civil suit was commenced one year and five months after petitioner's action (R. 35, 36, 43, 44) and after the indictment of the defendants in Indiana (R. 17). Even after the defendants had pleaded *nolo contendere* in the criminal proceedings and had been sentenced in June, 1943 (R. 18, 44), the Government waited almost a year before bringing its civil suit (R. 36, 44).* Such tardiness is the very evil at which the False Claims Statute was aimed, see *U. S. ex rel. Marcus* v. *Hess*, 317 U. S. 537, at 547 (1943). The pendency of the present action does not excuse the Government's delay; for concededly the Government never viewed it as an obstacle to a suit of its own (R. 19). Nor had the Government ground to await the outcome of its criminal action against Anaconda in Rhode Island (Gov't br. 6); for that action involved different individuals and different wrongs (R. 44); and the Government had no difficulty in filing its civil suit for the Rhode Island frauds simultaneously with the Rhode Island indictment (R. 17).

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* The case is thus quite different from *U. S.* v. *Baker-Lockwood Mfg. Co.*, 138 F. 2d 48, at 51-53 (C. C. A. 8, 1943), where the Government, "proceeding with diligence and dispatch" (p. 52), brought its civil action within two days after the commencement of the *qui tam* suit and within three days after the return of the indictment (pp. 49-50).

POINT II

Petitioner has a vested right by operation of law.

1. Respondents attempt to minimize our English authorities (main br. 13-15) on the ground that, according to 2 *Blackstone* 436-8, *Parliament* may release a penalty even after a *qui tam* suit is brought (Gov't br. 8; Anaconda br. 14). But in England the constitutional protection of vested rights is addressed only to the *Crown;* 2 *Anson, Law and Custom of the Constitution,* Pt. 1 (4th ed., 1935), pp. 320-2. "It is the theory of the British Constitution that Parliament is omnipotent"; *Farrington* v. *Tennessee,* 95 U. S. 679, at 684 (1878); *Brinton Coxe, Judicial Power and Unconstitutional Legislation* (1893), pp. 178-80. While Parliament, therefore, has power to destroy the vested rights of a *qui tam* plaintiff, Congress, bound as it is by the Fifth Amendment, has not.

Moreover, Blackstone's remark, invoked by respondents, is addressed only to *"penalties"*. It is therefore inapplicable to the False Claims Statute which, far from being a "penalty" law, is compensatory in nature (our main br. 19).

2. Respondents (Anaconda br. 7-11; Gov't br. 9-11) invoke a long line of cases to demonstrate that the right to a penalty will be destroyed by the repeal of the penalty statute although a *qui tam* action for the penalty has been commenced.* The correctness of the rule may be granted; but it does not aid respondents.

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* Respondents' cases should be used with caution since many of them did not involve *qui tam* actions. Note particularly *U. S.* v. *Morris,* 10 Wheat. (23 U. S.) 246 (1825); *U. S.* v. *Connor,* 138 U. S. 61 (1891); and *U. S.* v. *25,000 Gallons of Distilled Spirits,* Fed. Cas. No. 14,282 (D. C., S. D. N. Y., 1867), aff'd Fed. Cas. No. 15,564 (C. C., S. D. N. Y., 1868). In each of these cases the claimant had furnished information to the Government; but the suit against the wrongdoer was brought by the Government itself, was under its sole control, and the informer was not a party thereto. The peculiar *qui tam* rules were, therefore, inapplicable. Furthermore, there existed in each of these cases a statute which expressly reserved the Government's right to remit the penalty or which expressly provided that no right was to vest in the informer until actual collection of the penalty. No comparable statute exists in the case at bar.

(a) The doctrine that penalty rights are defeasible by a repeal of the penalty statute despite commencement of suit is not limited to *qui tam* actions; it applies equally where the penalty suit is brought by the Government itself, *Yeaton* v. *U. S.*, 5 Cranch (9 U. S.) 281 (1809); *State* v. *Tombeckbee Bank*, 1 Stew. (Ala.) 347 (1828), or by an injured individual in his own right, *Norris* v. *Crocker*, 13 How. (54 U. S.) 429, at 440 (1851). The vulnerability of the penalty right thus has nothing to do with the *qui tam* character of the suit, but arises from the weakness inherent in every suit for a penalty.

A suit under the False Claims Statute is not one for a "penalty", but for compensatory damages (our main br. 19). Respondents have not disputed that. Their authorities are, therefore, inapplicable. A statutory right to *damages* (as distinguished from penalties) is "property" and, as such, protected by the Constitution even before judgment. *Ettor* v. *Tacoma*, 228 U. S. 148 (1913); *Denver, S. P. & P. R. Co.* v. *Woodward*, 4 Colo. 162, at 168 (1878).

(b) We have further shown (main br. 19-20) that, even if this were a penalty suit, the 1943 amendment did not "repeal" the penalty but reconveyed it to the Government. Respondents' authorities, dealing only with repeals, do not sustain such reconveyance.*

The Government claims (br. 10-11) that our distinction between "repeal" and "reconveyance" is unsound because a property right entitled to constitutional protection would be invulnerable to either type of statute. But the Court below recognized the validity of our distinction (R. 61), and we believe that the Government's attack is untenable.

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* The Government says (br. 11) that some of its cases did not involve the repeal, but the change of a penalty law. But "where a statute imposes a new penalty for an offence, it repeals by implication so much of a former statute as established a different penalty"; *Nichols* v. *Squire*, 5 Pick. (22 Mass.) 168 (1827, syllabus). Moreover, even the change of a penalty is not comparable to its appropriation by the Government.

It is our position that the rights of a *qui tam* plaintiff in a penalty suit are "inchoate" in the sense that they can be destroyed by a repeal of the statute;* but that they are "vested" in the sense that the Government cannot reappropriate them. The Government's argument, on the other hand, assumes that a right cannot be "inchoate" for one purpose and "vested" for another. But it is elementary that legal terms may have different connotations for different purposes. This is particularly true of the terms "vested" and "inchoate".

In *M'Lane* v. *U. S.*, 6 Pet. (31 U. S.) 404 (1832), this Court called the plaintiff's right "inchoate" as against a *release* of the penalty (p. 426); but called it "vested" as against the Government's *appropriation* of the plaintiff's share in the penalty (p. 427). The same shift in phraseology is found in *Robison* v. *Beall*, 26 Ga. 17, at 47 (1858). Our distinction between "repeal" and "reappropriation" of a penalty is thus well founded.

POINT III

Petitioner also has a vested right by reason of his contract with the Government.

1. Respondents (Anaconda br. 18-19; Gov't br. 11-12) deny that the commencement of this suit created a contract between petitioner and the Government; for, they say, R. S. § 3493 is so worded as to make the relator's right dependent upon the recovery of judgment and collection. The argument has been answered (our main br. 18-19). If A agrees to sell B a car and B agrees to pay $1,000 therefor, A cannot sue for the price unless he has made or tendered delivery. Yet no one would contend that prior to delivery or tender there exists no valid contract. And

* Primarily we say, of course, that the present action is not a penalty suit and would, therefore, be invulnerable even to a repeal of the statute.

it is well settled that the Constitution, embodying as it does the "doctrine of the sacredness of vested rights", "applies alike to both executory and executed contracts, by whomsoever made". *Farrington* v. *Tennessee*, 95 U. S. 679, at 683 (1878).

2. Respondents say (Anaconda br. 13-14; Gov't br. 12) that there is no contract because petitioner cannot be compelled to prosecute this case to judgment. But petitioner is obligated by R. S. § 3491 not to discontinue, which is certainly an enforceable obligation, *U. S.* v. *Samuel Dunkel & Co.*, 61 F. Supp. 697, at 700 (D. C., S. D. N. Y., 1945); and his obligation to pay costs and expenses is equally enforceable. Moreover, the first *qui tam* plaintiff to bring suit preempts the field, even as against the Government (our main br. 17); by taking that position he assumes serious fiduciary duties which are likewise enforceable; see *Young* v. *Higbee Co.*, 324 U. S. 204, at 209-214, and notes 10, 12 and 13 (1945). The analogous Rule 23 (c), F. R. C. P., which forbids discontinuance of stockholders' suits, is viewed as "forcing the original plaintiff-shareholder to continue the action and carry it through to judgment", 2 *Moore's Fed. Pr.* 2282.

3. Respondents' authorities (Anaconda br. 8-10; Gov't br. 11) do not negate a contract.

Atwood v. *Buckingham*, 78 Conn. 423 (1905), was not even a *qui tam* action. The plaintiff sued for a penalty in his own right and for his sole account. This is rather different from the present case where the Government invited petitioner to sue for its benefit.

In *Coles* v. *County of Madison*, 1 Breese (Ill.) 115 (1826), the relator made the curious argument that, by bringing suit, he had made a contract or quasi-contract *with the defendant*. The court rejected this contention (p. 117). The question of a contract between the relator and the Government was neither raised nor decided.

In *Cushman* v. *Hale*, 68 Vt. 444 (1896), a statute awarded one-fourth of certain fines to the prosecuting officer. The court held that, under this statute, the State's Attorney had no contract right to his share, because of the broad rule, laid down in *Butler* v. *Pennsylvania*, 10 How. (51 U. S.) 402 (1850), that the right of public officers to their salary or other compensation is not contractual in character. Petitioner is no public officer; see *Hall* v. *Wisconsin*, 103 U. S. 5 (1880).

In *Allen* v. *Farrow*, 2 Bailey (18 S. C., Law) 584 (1831), a penalty statute was repealed while a *qui tam* suit for the penalty was pending. The relator argued that the State had contracted away its right to repeal the statute (p. 585). Without specifically answering this argument, the court sustained the repeal on the ground that the right to a penalty does not vest before judgment and collection (p. 586).

This decision does not help respondents. It is one thing to say that the State did not surrender its power to change its penal laws. It is a different thing to argue, as respondents do, that the Government, without repealing the penalty, may appropriate the relator's share. The State transferred to the relator the right to the penalty such as it was, i.e., defeasible by repeal of the statute. *Pope* v. *Lewis*, 4 Ala. 487, at 492 (1842). But short of a repeal of the penalty, the State was contractually bound to permit the relator the continued prosecution of his suit.

4. To disprove a contract, Anaconda (br. 11-13) invokes the so-called "bounty cases", *Salt Company* v. *East Saginaw*, 13 Wall. (80 U. S.) 373 (1872), followed in *Welch* v. *Cook*, 97 U. S. 541 (1878). Their pertinence is hard to see. The word "bounty" negatives the idea of a consideration, *Grand Lodge* v. *New Orleans*, 166 U. S. 143, at 146 (1897); it is treated as synonymous with "gratuity" and implies that "nothing (is) given in exchange", *Maricopa County* v. *Valley National Bank*, 318 U. S. 357, at 362 (1943). Since it is not suggested that the False Claims

Statute awards the relator's share gratuitously or without consideration, the bounty cases do not advance respondents' argument.

In *Salt Company* v. *East Saginaw, supra,* a Michigan statute had provided an annual bounty and tax exemption for all companies manufacturing salt in the State. Upon repeal of the statute, the Salt Company claimed a contract right to continued tax exemption. This Court rejected the claim because "the parties who entered upon the business (did not) promise how long they will continue the manufacture" and were "at liberty at any time to abandon such a course", so that merely "an arrangement determinable at the will of either of the parties" arose (13 Wall., at 377). By contrast petitioner, by commencing this suit, committed himself not to discontinue it. The Government, having stipulated this obligation, cannot now argue that the arrangement was "determinable at the will of either of the parties".

Moreover the statute involved in *Salt Company* v. *East Saginaw, supra,* was "a law dictated by public policy and the general good" (13 Wall., at 377). The False Claims Statute, on the other hand, was made by the Government to enlist private help in the collection of its claims. Such a statute lends itself more readily to contractual implications than a mere bounty law (our main br. 22-23).

5. Respondents (Anaconda br. 21, 23; Gov't br. 13) impute to us the claim that petitioner's position is analogous to that of an agent or attorney of the Government. But this very analogy has been most vigorously rejected in our main brief (24-25). Petitioner, we say, is the Government's assignee; and respondents have advanced no argument to refute this.

Proceeding on their false premise, respondents say (Gov't br. 13; Anaconda br. 23) that petitioner may sue the Government in the Court of Claims for the breach of the agency contract. However, the Government neither made an agency contract nor breached it. The Govern-

ment's contract did consist of the assignment to petitioner of the Government's rights,* in return for petitioner's undertaking to prosecute the case at his own expense and to pay over one-half of the proceeds to the Government. The essential part of the Government's bargain is thus performed; the assignment is consummated; and petitioner has neither ground nor occasion to sue the Government for breach of the contract. This also disposes of Anaconda's suggestion (br. 6) that this action seeks to compel specific performance by the Government.

POINT IV

Denial of federal jurisdiction by the 1943 Amendment of the False Claims Statute is tantamount to the destruction of petitioner's right.

Respondents (Anaconda br. 25-27; Gov't br. 14) attempt to support the denial of jurisdiction by invoking *Lynch* v. *U. S.*, 292 U. S. 571, at 580-2 (1934). But the *Lynch* case merely restates the old rule that the United States may not be sued without its consent and that the consent may be withdrawn at any time. "When the United States creates rights *against itself*, it is under no obligation to provide a remedy through the courts" (292 U. S., at 582, italics added). But here petitioner asserts no rights against the United States. It is not a defendant; no relief is sought against it. Petitioner's right was assigned to him by the United States; but it is directed, and he asserts it, only against Anaconda. To such a suit the rule of sovereign immunity, announced in the *Lynch* case, does not apply.

Respectfully submitted,

Moses B. Sherr,
Petitioner *pro se*.

Dated: October 17, 1945.

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* A *qui tam* suit for a penalty "is, in effect, a transfer by the State to one of its members of a penalty forfeited to the body politic", *Pope* v. *Lewis*, 4 Ala. 487, at 492 (1842).